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Legally Speaking: Libraries Reverse Course on Need for Legislative Reform

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LEGAL ISSUES



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Legally Speaking — Libraries Reverse Course on Need for Legislative Reform

by **Bill Hannay** (Schiff Hardin LLP, Chicago) <whannay@schiffhardincom>

The U.S. Copyright Office in Washington, D.C., wants to know what legislative, regulatory, or other solutions are needed to resolve the problem of “orphan works” and mass digitization, and the library community has responded by saying “no, thank you.” A memorandum submitted by the **Library Copyright Alliance (LCA)** in mid-January unequivocally asserts that “libraries no longer need legislative reform in order to make appropriate uses of orphan works.”

Eight years ago, the **LCA** — which included the **American Library Association**, the **Association of College and Research Libraries**, and the **Association of Research Libraries** — wrote to the Copyright Office, asserting that “the **Copyright Act** must be amended to address the orphan work problem.” The **LCA** recommended in its March 2005 comments that Congress “limit the remedies when a user has engaged in a reasonable, but ultimately unsuccessful, search for the copyright owner.”

In its comments filed in 2013, the **LCA** explains that “significant changes in the copyright landscape over the past seven years convince us that libraries no longer need legislative reform in order to make appropriate uses of orphan works.” The changes include the following:

1. Fair use is less uncertain, because of a number of recent court cases and the publication of the **ARL’s Code of Best Practices in Fair Use for Academic and Research Libraries**, available at <http://www.arl.org/pp/ppcopyright/codefairuse/code/index.shtml>.
2. Court-ordered injunctions are less likely to be issued because of a 2006 U.S. Supreme Court decision holding that “irreparable injury” from an infringement of intellectual property can no longer be presumed by judges.
3. Mass digitization is more common, ranging from routine “caching” of Web pages by search engine companies to **HathiTrust’s** orphan works project.

As a result, the **LCA** concludes that the library community feels comfortable relying on fair use; however, **LCA** acknowledges that “other communities” may prefer greater certainty concerning what steps they would need to take to fall within a safe harbor.

If Congress does want to consider legislation, **LCA** “strongly urges” it to abandon the approach in the proposed legislation that passed the U.S. Senate in 2008 (and died in the House). According to the **LCA**, that bill — **S. 2913** which was named the **Shawn Bentley Orphan Works Act** after a long-time Senate staff member — had become “increasingly complex and convoluted” as it worked its way through Congress. Instead, the library group recommends “a simple one sentence amendment” to the **Copyright Act** that would grant courts the discretion to reduce or remit statutory damages in appropriate circumstances.

If Congress prefers to develop a more detailed piece of legislation, libraries would support an effort to amend the copyright laws *only* if it offered significant benefits over the status quo and included the following features (as outlined in an **LCA** statement issued in 2011):

- The non-commercial use (i.e., reproduction, distribution, public performance, public display, or preparation of a derivative work) by a nonprofit

library or archives of a work when it possesses a copy of that work in its collection:

- would not be subject to statutory damages;
 - would not be subject to actual damages if the use ceases when the library or archives receives an objection from the copyright owner of the work; and
 - would be subject to injunctive relief only to the extent that the use continues after the library or archives receives an objection from the copyright owner of the work.
- This limitation on remedies would apply to the employees of the library or archives, as well as to a consortium that includes the library or archives.
 - Copyright owner objections would have no effect on a library’s rights under fair use.

My Prediction: Given the continually-changing legal and academic environment noted in the **LCA’s** report, it seems likely that the Copyright Office (and Congress) will take a wait-and-see attitude before jumping into an active effort to revise the copyright laws. 🐼

Questions & Answers — Copyright Column

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QUESTION: *Does a public library need a public performance license to play children’s music recordings in the library as a background for story hour?*

ANSWER: The playing of music in a public place, such as in a public library, is a

public performance as defined by the copyright law. Sound recordings, however, do not have public performance rights. This means that the performance right belongs to the composer or other copyright owner of the music, and his or

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